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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4178 OF 2006

Ms.Malin Lundberg Isabelle .. Applicant
Versus
Union of India & Anr. .. Respondent

Mr.A.P.Mundargi, Senior Advocate for applicant
Ms.Poornima Kantharia for NCB
Mr.Y.M.Nakhwa, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 22nd December 2006

Judgement:-

. The short question in this criminal application for bail is whether the provisions of Section 10 of the General Clauses Act can be applied to a case covered by proviso to Section 167(2) of Cr.P.C. In other words, despite the period of sixty days or ninety days prescribed therein being over, the mandate to release the accused on bail does not come into play, if the

charge sheet is filed on sixty-first day or ninety-first day.

2. The facts lie in a very narrow compass. The applicant before me is a foreigner. To be precise she is a citizen of Finland. She is in custody since 10th May 2006 for alleged possession of 6534 gms. of Hashish, which quantity is a commercial quantity and, therefore, there is violation of relevant provisions of N.D.P.S. Act. She was produced before the learned Special Judge on 10th May 2006. It is her case that 180 days expired from the date of such production on 5th May 2006 and an indefeasible right accrued in her favour by virtue of section 36A of NDPS Act, 1985 read with Section 167(2) of Cr.P.C. She applied for bail on 6th November 2006. The short submission on her behalf was that section 36 of N.D.P.S. Act indicates that complaint/charge sheet in cases where commercial quantity is involved be filed within 180 days. Upon failure to do so, the

right accrues in favour of applicant to be released on bail. The same was exercised before filing of charge sheet/complaint and upon expiry of the period of 180 days, the 180th day being 5th November 2006.

3. This application was contested by the prosecution and it was contended that 5th November 2006 being Sunday, the complaint/charge sheet was laid on 6th November 2006 during working hours and the so called indefeasible right, therefore, does not accrue in favour of the applicant. Consequently, her bail application should be dismissed.

4. Accepting this argument on behalf of prosecution and by referring to section 10 of General Clauses Act 1897, learned Special Judge has denied bail to the applicant vide his order dated 6th November 2006. That is how the present application is preferred in this Court.

5. Mr.Mundargi, learned Senior Counsel for applicant submits that there cannot be any dispute about the applicability of provisions contained in section 36A of N.D.P.S. Act and Section 167(2) of Cr.P.C. He submits that section 10 of General Clauses Act cannot be applied nor its principles invoked in the instant case because the pre-requisite prescribed therein is not satisfied in this case. He submits that this is a matter of liberty of an individual. There is a mandate flowing from the Statutory provisions. There is no discretion left in the court. Upon completion of the period of 180 days, if no complaint/charge sheet is filed, then, the accused must be enlarged on bail, if he offers to do so. It is only if the accused does not wish to be enlarged on bail or does not offer himself for being so enlarged, that bail can be denied. Otherwise, releasing on bail is the mandate flowing from the provisions. Section 10 of General Clauses Act deals with computation of time, where by any Central Act or Regulation made

after the commencement of General Clauses Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. He submits that this provision does not apply to any act or proceedings to which Limitation Act applies. However, this is a provision which cannot be invoked to defeat the mandate of section 167(2) of Cr.P.C. and it is now well settled by two decisions of this Court. Two learned Single Judges of this Court have taken a view that Section 10 can have no application to cases of grant of bail under proviso to section 167(2) of Cr.P.C. These judgements are binding upon me. They were binding upon learned Special Judge, as well. In such circumstances, and when N.D.P.S. and

Cr.P.C. contain pari-materia provisions, the applicant deserves to be enlarged on bail.

6. In support of his contentions Mr.Mundargi relied upon following decisions:-

i) Union of India Vs. Thamisharasi & Ors. (J.T. 1995 (4) S.C. 253;

ii) Uday Mohanlal Acharya Vs. State of Maharashtra (2001 S.C.C. (Cri) 760

iii) Rajeev Chaudhary Vs. State (NCT) Delhi (2001 S.C.C. (Cri) 819;

iv) State of Maharashtra Vs. Sharad B. Sarda (1983 (1) Bom.C.R. 578);

v) Habibulla Saudagar Vs. State of Maharashtra (1988 Mh.L.J. 285);

vi) Dinesh Yadav Vs. State and Ors. (2002 Cri.L.J. 1067)

vii) Ganesh Prasad Vs. State of M.P. (2001 Cri.L.J. 3444

7. On the other hand Ms.Kantharia learned Advocate appearing for Union of India submits that the bail has been rightly denied to the applicant. She submits that 5th November 2006 being Sunday, the complaint/charge sheet was laid on 6th November 2006 which is a working day/Monday. She states that in such circumstances Section 10 of the General Clauses Act was applicable and the principle underlying the same would hold good even in a case covered by section 167(2) of Cr.P.C. In any event, she submits that the applicant in this case is facing trial for offences punishable under N.D.P.S. Act. The procedure under the N.D.P.S. Act is that the NCB files a complaint in Court of

Special Judge. Unlike any other case where a charge sheet or challan is laid in a special case under N.D.P.S.Act, the Bureau files a complaint. That complaint is to be filed in the Court. Filing/lodging of the same cannot be done on Sunday and was, therefore, rightly done on the very next day i.e. Monday. The complaint having been filed within working hours, the 180th day would be 6th November 2006. The complaint being lodged at 11.00 a.m. the so called indefeasible right of the applicant is extinguished and consequently the application was rightly rejected.

8. In support of her submissions, Ms.Kantharia has relied upon the following decisions:

i) State of M.P. Vs. Rustam & Ors. (1995 Supp (3) S.C.C. 221;

(ii) H.H.Raja Harinder Singh Vs.

S.Karnail Singh (A.I.R. 1957 S.C. 271)

(iii) Nirapat and Anr. Vs. State of U.P. (1988 ALL.L.J. 1146)

9. For properly appreciating the rival contentions a reference to both sections 36A of N.D.P.S. Act and Section 167(2) of Cr.P.C. is necessary. The same read as under:-

"36A: Offences triable by Special Courts:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) All offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which

the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) Where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole such Magistrate is an

Executive Magistrate;

"167(2): The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction"

10. In the case reported in 1995 J.T. (4) S.C. 253 (Union of India Vs. Thamisharasi & Ors) the Supreme Court has observed that the proviso to sub-section (2) of Section 167 of Cr.P.C. can be invoked by an accused arrested for commission of an offence under the N.D.P.S.

Act, for releasing him on bail on the expiry of the total period specified therein if the complaint is not filed within that period. In this context the Supreme Court has observed thus:-

> "8: Section 36-A makes it clear that a person accused of or suspected of the commission of an offence under the N.D.P.S.Act is to be forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 Cr.P.C.; and the Special Court constituted under Section 36 of the Act exercises, in relation to the person so forwarded to it, the same power which a Magistrate having jurisdiction may exercise under Section 167 Cr.P.C. in relation to an accused person forwarded to him under that Section. The clear reference to the power of the magistrate under Section 167 Cr.P.C., particularly sub-section (2)

thereof, is an indicatiion that no part of sub-section (2) of Section 167 of the Code is inapplicable in such a case unless there be any specific provision to the contrary in the N.D.P.S.Act. This conclusion is reinforced by some other provisions of the N.D.P.S.Act. Section 36-C says that "save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court." This also indicates that the provisions in the Code of Criminal Procedure relating to bail and bonds are applicable to the proceedings before a Special Court under the N.D.P.S.Act "save as otherwise provided in this Act." Section 51 also says that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with

the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act. Except for Section 37 of the N.D.P.S.Act, no other provision of the N.D.P.S.Act is relied on to contend that there is any inconsistent provision in the N.D.P.S.Act to exclude the applicability merely of the proviso to sub-section (2) of Section 167 Cr.P.C. when sub-section (2) of Section 167 of the Code is made expressly applicable by Section 36-A of the N.D.P.S.Act.

"9: The question, therefore, is : Whether Section 37 of the N.D.P.S.Act is an inconsistent provision of this kind to exclude the applicability merely of the proviso to sub-section (2) of Section 167 Cr.P.C. is expressly made applicable by the N.D.P.S.Act? The non-obstante clause at the beginning of sub-section (1) of Section 37 indicates that the provisions

in clauses (a) and (b) thereof are inconsistent with the corresponding provisions of the Code. Clause (a) makes every offence punishable under this Act to be cognizable. Clause (b) imposes limitations on granting of bail specified therein which are in addition to the limitations under the Code of Criminal Procedure on granting of bail as stated in sub-section (2) of Section 37. Clause (b) of sub-section (1) specifies the two limitations on granting of bail, namely, (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The learned Additional Solicitor General contends that these limitations on granting of bail specified in clause

(b) of sub-section (1) of Section 37 indicate that the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. is excluded in such cases. We are unable to accept this contention.

"13: Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provision in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the

applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. which operates in a different field relating to the total period of custody of the accused permissible during investigation.

"14: In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 Cr.P.C. in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the N.D.P.S.Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr.P.C. which is expressly applied. The absence of any provision inconsistent

therewith in this Act is significant.

11. Further in a decision reported in 2001 S.C.C. (Cri) 760, the Supreme Court has referred to its later decision this very point reported in 1996(1) S.C.C. 718 (Dr.Bipin Panchal Vs. State of Gujarat).

12. The right stood extinguished in Dr.Panchal's because of peculiar facts of that case. However, the principle that sub-section 2 of Section 167 of Cr.P.C. would apply to accused under N.D.P.S. Act has been noted and followed. Later decision is of Uday Acharya Vs. State of Maharashtra, reported in 2001 S.C.C. (Cri) 760.

13. The Supreme Court noting the mandate of the relevant provisions observes thus:-

> "6: There cannot be any dispute that on expiry of the period indicated in the

proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to and there lies the rub. The grievance of the accused is that for a variety of reasons the Magistrate or even the superior court would refuse to pass an order releasing the accused on

bail, notwithstanding the preconditions required under the proviso are satisfied and then when the accused moves the High Court or the Supreme Court during the interregnum the police files a challan. It was also contended by Mr.Tulsi that a Public Prosecutor may take adjournment from the court when the bail application was being moved and then would persuade the investigating agency to file a challan and then contend that the court would not be entitled to release the accused on bail under the proviso to sub-section (2) of Section 167, and in that situation not only the positive command of the legislature is flouted but also an unauthorised period of custody is being legalised and this would be an infraction of the constitutional provision within the meaning of Article 22. In Hitendra Vishnu Thakur v. State of Maharashtra two learned Judges of this

Court construed the provisions of Section 167 of the Code of Criminal Procedure Code read with sub-section (4) of Section 20 of TADA. After examining in detail the object behind the enactment of Section 167 of the Code of Criminal Procedure and the object of Parliament introducing the proviso to sub-section (2) of Section 167 prescribing the outer limit within which the investigation must be completed the Court expressed that the proviso to sub-section (2) of Section 167 read with Section 20(4)(b) of TADA creates an indefeasible right in an accused person on account of the default by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail and such order is generally termed as an "order on default." The Court also held that an

obligation is cast upon the court to inform the accused of his right of being released on bail and enable him to make an application in that behalf. It was also further held that the accused would be entitled to move an application for being admitted on bail and the Designated Court shall release him on bail if the accused seeks to be so released and furnished the requisite bail. The Court declined to agree with the contention of the accused that the Magistrate must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail.

"10: In Bipin Shantilal Panchal (Dr) v. State of Gujarat, a three-Judge Bench decision, this Court referred to the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure and

held that though the aforesaid provisions would apply to an accused under the NDPS Act,but since the charge-sheet had already been filed and the accused is in custody on the basis of orders of remand passed under other provisions of the Code the so-called indefeasible right of the accused must be held to have been extinguished, as was held by the Constitution Bench in Sanjay Dutt. The Court observed thus: (SCC p.720, para 4).

> "Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in Aslam Babalal

Desai v. State of Maharashtra."

"13: In State of M.P. v. Rustam this Court set aside the order of the High Court where the High Court had released the accused on bail, charge-sheet not having been filed within the period stipulated in Section 167(2) of the Code of Criminal Procedure, as by the time High Court entertained the bail application, challan had already been filed, this Court had observed that the court is required to examine the availability of the right to compulsive bail on the date it is considering the question of bail and not barely on the date of presentation of the petition for bail. This Court came to the conclusion: (SCC p.223, para 4)

> "On the dates when the High Court entertained the petition for bail and granted it to the

accused-respondents, undeniably the challan stood filed in court, and then the right as such was not available."

A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and right can be availed by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail,necessarily, therefore, an order of the court has to be passed. It is also further clear that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt case. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible

right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused filed an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the

matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision in this Court in State of M.P. v. Rustam setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and therefore, the right stood extinguished, in our considered opinion does not express the correct position in law of the expressions "if already not availed of", used by the Constitution Bench in Sanjay Dutt. We would be failing in our duty if we do not notice the decisions mentioned by the Constitution Bench in Sanjay Dutt case which decisions according to the learned counsel, appearing for the State, clinch the issue. In Makhan Singh Tarsikka v. State of Punjab an order of detention had been assailed in a petition filed under Article 32, on the ground that the period of

detention could not be indicated in the initial order itself, as under the provisions of the Preventive Detention Act, 1950, it is only when the Advisory Board reports that there is sufficient cause for detention, the appropriate Government may confirm the detention order and continue the of the detenu for such period, as it thinks fit. On a construction of the relevant provisions of the Preventive Detention Act, as it stood then this Court accepted the contention and came to hold that the fixing of the period of detention in the initial order was contrary to the scheme of the Act and could not be sustained. We fail to understand as to how this decision is of any assistance for arriving at a just conclusion on the issue, which we are faced with in the present case. The next decision is the case of Ram Narayan Singh v. State of Delhi. In this case on a habeas corpus petition being filed under Article 32, the Court was examining the legality of the detention on the date the Court was considering the matter. From the facts of the case, it transpires that there was no material to establish that there was a valid order of remand of the accused. The Court, therefore, held that even if the earlier order of remand may be held to be a valid one, but the same having expired and no longer being in force and there being no

valid order of remand, the detention was invalid. It is in this context, an observation has been made that in a question of habeas corpus, lawfulness or otherwise, custody of the person concerned will have to be examined with reference to the date of the return and not with reference to the institution of the proceedings. There cannot be any dispute with the aforesaid proposition, but in the case in hand, the consequences of default on the part of the investigating officer in not filing the charge-sheet within the prescribed period have been indicated in the provisions of the statute itself and the language is of mandatory character, namely the accused shall be released on bail In view of the aforesaid language of the proviso to sub-section (2) of Section 167 and in view of the expression used in Sanjay Dutt case to the effect "if not availed", the aforesaid decision will be of no assistance. The third decision to in Sanjay Dutt case is the case of A.K.Gopalan v. Govt.of India. This was also a case for issuance of a writ of habeas corpus, filed under Article 32. In this case the Constitution Bench observed: (SCR p.430 C-D)

"It is well settled that in dealing with a petition for habeas corpus the court has to see whether the detention on the

date on which the application is made to the court is legal, if nothing more has intervened between the date of the application and the date of hearing."

"In that case, the detenu was detained by order passed on 4-3-1965 and the earlier order of detention passed on 29-12-1964 was no longer in force, when the detenu filed the application in the Supreme Court. The Court, therefore observed that it is not necessary to consider the validity of the detention order made on 29-12-1964 and the Court is only concerned with the validity of the order of detention dated 4-3-1965. The observations made by the Court and the principles enunciated referred to earlier would support our conclusion that the rights whether accrued or not to an accused, will have to be considered on the date he filed the application for bail and not with reference to any later point of time. In Abdul Latif Wahab Sheikh v. B.K. Jha where the final order of detention had been assailed, this Court had observed that in a habeas corpus proceeding it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with, before the date of hearing and, therefore, the detention should be upheld. The aforesaid observation had been

made when there was no Advisory Board in existence to whom a reference could be made and whose report could be obtained, as required by the Constitution. Further the representation filed by the detenu had not been disposed of within the stipulated period, but an argument had been advanced that by the date of hearing of the petition the representation had been disposed of. This Court did not accept the plea of the State and interfered with the order of detention. In interpreting the expression "if not availed of" in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a court by giving a strained interpretation of the provisions of the Act. In aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a

fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of

the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is not provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused

on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation

relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of

default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of

Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible

right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

. With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other

hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail already granted in accordance with law laid down by this Court in the case of Mohd.Iqbal v. State of Maharashtra."

14. As to whether section 10 of the General clauses Act could be invoked in such cases also fell for consideration of this Court in a case reported in 1983(1) Bom.C.R. 578 (State of Maharashtra Vs. Sharad B. Sarda). A learned Single Judge (M.P.Kanade, J as His Lordship then was) of this Court dealing with identical arguments has observed that the right under

section 167(2) being indefeasible and absolute, cannot be allowed to be defeated by resorting to section 10 of General Clauses Act. In paras 13 and 14 this is what the learned Judge has observed:

> "13: The point to be decided is, as to whether the provisions of section 10 of the General Clauses Act, 1897 are attracted by the facts of this case. Mr.Hudlikar contended that 90th day of detention of the accused falls on Sunday i.e. on September 12, 1982, so on the next opening of the Court a charge-sheet is filed on September, 13, 1982, and therefore, the proceeding shall be considered as done or taken indue time, on the next day afterwards on which the Court is opened. Section 10 of General Clauses Act lays down that whereby any Central Act or regulation made after the commencement of this Act, any act or

proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed then if the Court or office is closed on that day or the last day of the prescribed period the act or the proceeding shall be considered as done or taken in due time. According to Mr..Hudlikar, filling of the charge-sheet on September 13, 1982 on opening of the Court on that day was saved by Section 10 of the General Clauses Act. It is true that the Court was closed on September 12, 1982 the day being Sunday and the charge-sheet is filed on 13th September 1982. The question is as to whether under the Code any time has been prescribed for filling of a charge-sheet. Mr.Hudlikar fairly conceded that there is not prescribed period mentioned in the Code to file a charge-sheet. What is required under section 10 of the General Clauses Act is

that any act or proceeding directed or allowed to be done or taken in any Court on a certain day or within prescribed period then the act or the proceeding shall be considered as done or taken in due time is it is done or taken on the next day afterwards on which the Court is opened. As stated above no certain day was fixed by the order of the Court or any period prescribed for filing of the charge-sheet. The prosecution could have filed the charge-sheet earlier than September 12, 1982. Except filing of the charge-sheet on September 13, 1982 nothing has been done as directed or allowed to be done and it is, therefore, that the provisions of section 10 of the General Clauses Act will not apply. An absolute right accrued to the accused on the expiry of 90 days and it cannot be defeated by merely filling of the charge-sheet on September 13, 1982. The

right is accrued the moment 90 days are over, whether that 90th day falls on a holiday or not. The accused continued to be in custody and, therefore, the provisions of Section 167(2) lays down that he can be in the custody only for a period of 90 days or 60 days, as the case may be. As stated above the right is accrued to the accused and it is the duty of the Magistrate to inform the accused that he is entitled to be released on bail, and this absolute right of the accused cannot be allowed to be defeated by resorting to the provisions of section 10 of the General Clauses Act. Thus, in this view of the matter it must be held that section 10 of the General Clauses Act does not apply to this case.

"14: It is significant to note that by the mere filling of a charge-sheet by the prosecution the right to be released of

an accused person does not come to an end under proviso (a) to section 167 (2) of the Code. As a matter of fact section 167 of the Code does not mention filing of a charge-sheet by police. It lays down that the Magistrate can grant remand in judicial custody for a period of 90 days or 60 days, as the case may be, and on expiry of the said period there is an entitlement to an accused person to be released on bail and if he can furnish a security to the satisfaction of the Magistrate he shall be forthwith released. It is useful to refer to some other sections relating to filing of a charge-sheet by the prosecution. Section 173 of the Code refers to a report of the Police Officer on completion of the investigation. And if a report is filed under section 173 then the Magistrate should see as to whether the said case is triable by him or exclusively triable by

the Court of Sessions. On filing of the report and the charge-sheet by the police, if it appears to the Magistrate that the offence is exclusively triable by the Court of Sessions he shall commit the accused, after applying the provisions of section 207 or 208 of the Code, as the case may be, subject to the provisions of this Code relating to bail he shall remand the accused to the custody until last commitment is made. If the charge-sheet is filed within 90 days or 60 days, as the case may be, the Magistrate gets power under section 209 to remand the accused to custody until such commitment has been made but if a charge-sheet is not filed it is not possible for the Magistrate to know as to whether the offence is triable by himself or exclusively by the Court of Sessions and in the absence of charge-sheet there is no alternative or discretion with the

Magistrate except to give benefit of provisions of proviso (a) to section 167 (2) of the Code. So on merely filing of the charge-sheet after the expiry of the period of 90 days or 60 days, as the case may be, the accused is not deprived of a right earned by him to be released on bail. Mr.Bhonsale is right, when he argues that if an accused is released on bail in view of the provisions of section 167 (2) of the Code then the prosecution can only ask for cancellation of bail as provided under section 437(5), which lays down that any Court which has released an accused person on bail under sub-section (1) or (2) of section 437 shall record in writing his reasons for so doing. Similar is the provision under section 439 (2) of the Code. It appears that merely on filing a charge-sheet after the expiry of period of 90 days the accused cannot be remanded to the custody because

he has earned an absolute right to be released on bail under section 167(2) of the Code. In (Bashir and others v. State of Haryana), A.I.R. 1978 S.C., 55 it is observed that "the power of the Court to cancel bail if it considers it necessary is preserved in cases where a person has been released on bail under section 437(1) & (2) and these provisions are applicable to a person who has been released under section 167(2)." It is further observed that "The fact that before an order was passed under section 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under section 437(5). Neither is it a valid ground that subsequent to release of the accused a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary

> to do so under section 437 (5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody." In view of this clear authority of Supreme Court, it is not possible to contend that merely filing of a charge-sheet by the prosecution an absolute right earned by accused under section 167(2) comes to an end. If at all the prosecution wants the accused in custody it must file an application for cancellation of bail granted by the Magistrate."

15. In a later decision, reported in 1988 MLJ 285, the view taken earlier has been followed by another learned Single Judge (V.P.Tipnis J, as His Lordship then was) of this Court.

16. Ms.Kantharia, however, would rely upon a decision of the Supreme Court reported in 1995 Supp.(3) S.C.C. 221 and particularly the following observations therein:-

> "3: We find that the High Court was in error --- both in the matter of computation of the period of 90 days prescribed as also in applying the principle of compulsive bail on entertaining a petition after the challan was filed as the so-called "indefeasible right" of the accused, in our view stood defeated by efflux of time. The prescribed period of 90 days, in our view, would instantly commence either from 4-9-1993 (excluding from it 3-9-1993) or 3-12-1993 (including in it 2-12-1993). Clear 90 days have to expire before the right begins. Plainly put, one of the days on either side has to be

excluded in computing the prescribed period of 90 days. Sections 9 and 10 of the General Clauses Act warrant such an interpretation in computing the prescribed period of 90 days. The period of limitation thus computed on reckoning 27 days of September, 31 days of October and 30 days of November would leave two clear in December to compute 90 days and on which date the challan was filed, when the day running was the 90th day. The High Court was, thus, obviously in error in assuming that on 2-12-1993 when the challan was filed, period of 90 days had expired.

17. She also relies upon the judgement of a learned Single Judge of Allahabad High Court and the observations of the Supreme Court in A.I.R. 1957 S.C. 279, Harinder Singh Vs. Kernel Singh. She submits that object of section 10 is to permit something to be done what could have done

on a holiday, on the next day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then according to the section, the act should be considered to have been done within that period, if it is done on the next day on which the court or office is open. For that section to apply all that is required is that there should be period prescribed and that period should expire on holiday.

18. It is not possible to agree with Ms.Kantharia. In the decision reported in 1986 Cr.L.J. 2089 a Division Bench of the Hon'ble Delhi High Court has observed thus:-

> "8. A plain reading of Section 10 of General Clauses Act would, therefore, go to show that there should be a period prescribed for the performance of an act in a Court or office. It is only in such cases that if the last date of limitation

prescribed expires on a holiday then Section 10 comes into play and makes it permissible to do that act on the next day when the Court or office opens. Section 10 of the General Clauses Act, therefore, clearly pre-supposes that there must be in existence a positive act to be performed by person and for the performance of which there is in existence a period prescribed by law. It will have no application in any other situation."

"10. A bare reading of the aforesaid provision of the Code would go to show that this provision merely confers power on the Magistrate to commit to custody an accused person and there is limitation of 90 days and 60 days, as the case may be. This provision of the Code falls under Chapter XII of the Code relating to information to the police and their

powers to investigate. It is thus clear that this is a power which is only exercisable during the course of investigation of a case. The power to commit an accused person to custody after investigation is over and after the charge sheet is presented before the Court, is derived from Section 309, Cr.P.C. Any further remand to judicial custody beyond 90 days and 60 days without the charge sheet being presented before the Court will be without the authority of law."

"11. Sub-section (2) of Section 167 of the Code nowhere prescribes a period within which the police is required to present charge-sheet before the court nor does it envisage the performance of an act by an accused person within a particular period before a Court or office. In fact, nowhere in the Code a

period is prescribed for investigation to produce the charge sheet before a Court of law. Since the Legislature in its wisdom has not prescribed a period within which the investigation has to present charge sheet against an accused person before a Court, it would be wrong to say that the provision of Section 167(2) of Code had prescribed the limit by implication. If the Legislature had aimed it to be so, there was nothing to prevent it from saying so explicitly. By invoking the doctrine of implication we will be importing something in the provision which the Legislature has deliberately refrained to do. It will not only have the effect to distorting the provision but will also defeat the legislative intent.

12. In Sureya Reddy's case (1985 Cri.L.J. 939) (Supra), A division Bench

of Orissa High Court has ruled out that Section 10 of the General Clauses Act is attracted if the charge sheet against the accused person could not be presented on the 60th or 90th day for the reason of being a public holiday and this is so ruled on the ground that by implication Section 167(2) does prescribe a period for presentation of charge sheet before a Court. We have carefully considered this proposition but we respectfully do not agree with the aforesaid view for the reasons stated above."

13. A contrary view to the aforesaid authority, with which we agree, has been taken by the High Court of Bombay in State of Maharashtra V. Sharad B. Sarda) (1983(2) Cri.L.C. 18) wherein it was held that in a case such as this, Section 10 of the General Clauses Act has no application as the Code does not

prescribe any time limit for presentation of charge sheet by the investigation. The learned Judge further ruled that after the expiry of time of 90 or 60 days, the right accruing to the accused is absolute. One of our own Judges in Criminal Misc. (Main) 504 of 1985, Bhagwat Singh Vs. State has had an occasion to consider the proposition regarding application of Section 10 of General Clauses Act and has opined that it has no application and the accused person after the expiry of 90 days or 60 days as the case may be, is entitled to be released on bail. We are in respectful agreement with the view taken in the aforesaid cases i.e. by the learned Judge of Bombay High Court and by the learned Judge of our own High Court.

14. Adverting to the scope and object of sub-section (2) of Section 167

Cr.P.C., we may at once point out that this is essentially a power given to the Magistrates to be exercised pending investigation. This power ceases to exist after the expiry of 90 days or 60 days as the case may be and, there is no lawful authority left with the Magistrate to detain a person in custody for a further period unless he offers him bail and the accused person fails to furnish the same. This section in turn does not require an accused person to make an application for bail. The entitlement to be released on bail accrues to him by operation of statute at the end of 90 days or 60 days as the case may be. He is to be offered bail and has to be released unless he fails to furnish the same. At the end of the expiry of the aforesaid period this right accruing to the accused person would be deemed to be absolute and indefeasible and, without

offering bail his further custody, may be, for even a day, without the charge sheet being presented, would be without any jurisdiction. It is not a right of doing an act but a right to be freed without his asking for the same. The provisions of Section 167(2) of the Code cast a duty upon the Magistrate to offer bail. In this regard we may make reference also to Natabar Parida Vs. State of Orissa, A.I.R. 1975 S.C. 1465: (1975 Cri.L.J. 1212). While considering the scope of the provisions of Section 167(2) of the Code their Lordships of the Supreme Court in para 8 of the judgement at page 1469 (of A.I.R. : (at page 1216 of Cri.L.J) have made the following observations:-

> ". In serious offences of criminal conspiracy murders, dacoities, robberies by inter-state gangs or the like, it may not be possible for the police, in the circumstances as

they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under section 167 will be deemed to be so released under the provisions of Chap.XXXIII and for the purposes of that Chapter. That may empower the Court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-section (5) of Section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognisance the power of remand is to be exercised under section 309 of the new Code. But if it is not possible to complete, the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals" but surely it would not be so, as sometimes it is supposed to be because of the Courts. It would be so under the command of the Legislature.

. Similar views have been expressed

in respect of the scope of Section 167(2) in Noor Mohammad Vs. State, ILR (1978) 2 Delhi 442; (1980 Cri.L.J. NOC 27)."

"15. Having given our careful consideration to the facts of the present case, the arguments of the learned counsel for the parties, the relevant statutes and case law on the subject, we are of the view that under the provision of Section 167(2) of the Code an accused person against whom charge-sheet is not presented before the Court within the period of 90 or 60 days, as the case may be, is entitled to be offered bail as a matter of right. For this there is no requirement of law for him to apply. The bail has to be offered to him and he can only be detained in further custody if he fails to furnish bail. The only provision under which an accused person can be detained thereafter is Section 309

of the Code but for the exercise of that power the pre-requisite is that there must be a charge-sheet pending before the Court. This right of the accused person, therefore, under section 167(2) of the Code is absolute and indefeasible unless he fails to furnish the bail. We are also in full agreement with the observations made in Noor Mohammad's case (supra) that Section 167(2) of the Code does not cease to apply even if the charge sheet is submitted after 90 or 60 days and the accused is entitled to ask for the right which had already accrued to him. We are also of the view that section 10 of the General Clauses Act is not applicable in such a situation and it cannot be invoked to defeat the accrued right of an accused person to be freed. We are further of the view that the Magistrates should monitor the remand proceedings during investigation in such

> a manner so that a full account of the remand is handy and bail is offered to such accused person at the end of 90 or 60 days, as the case may be. We are giving these reasons in support of our order dated 30th July 1986."

19. It is pertinent to note that the Division Bench of Delhi High Court has followed the decision of the learned Single Judge of this Court in preference to other view. May be the Allahabad High Court has distinguished the same but it is pertinent to note from a perusal of the judgement of learned Single Judge of Allahabad High Court that the issue has been decided by following Raja Harinder Singh’s case (supra) which has been distinguished by the Division Bench of Delhi High Court. In my view when it is not demonstrated that the Judgment of this court is either Per Iucuriam or no longer good law, judicial discipline requires that I follow the same.

20. It is not necessary for me to go into any larger question about the nature of Right conferred by proviso to Section 167(2) of Cr.P.C. The decision of this Court so also of the Delhi High Court takes a view that Section 10 of General Clauses Act is inapplicable. The other observations and findings therein, are therefore, not germane in the facts of this case.

21. The Supreme Court decision relied upon by Ms.Kantharia does not decide the point at all. That apart in the above quoted observations the Supreme Court, while computing the days in a month which are required for computation of the period specified by 167(2) of Cr.P.C, has included Sundays and Holidays as well. Hence, this decision is not on the point at all.

22. In my view, once learned Single Judges of this Court have taken a view that section 10 was inapplicable, learned Special Judge was in error

in relying upon the said provision (section 10 of General Clauses Act) and applying it in the facts of the present case. His attention was not invited to the judgements of Supreme Court applying the provisions of Section 167(2) of Cr.P.C. to N.D.P.S. cases, principles underlying the same, nature of right conferred upon the accused thereunder. Further, learned Special Judge's attention was also not invited to the Binding Judgements of this Court.

23. In these circumstances, the applicant deserves to be enlarged on bail only on this ground. There is no dispute about the factual position. In these circumstances following order would meet the ends of justice:-

i) The applicant arrested in connection with Remand Application No.101 of 2006 (N.D.P.S. Special Case No.162 of 2006) by Air Intelligence Unit, Customs, Mumbai shall be enlarged on bail in the

sum of Rs.1 lakh with one or two local sureties in the like amount.

ii) The bail is granted subject to condition that the applicant will report to Air Intelligence Officer, Air Intelligence Unit of Customs, Mumbai once in a fortnight on every 1st and 15th of every month between 5.00 p.m. and 7.00 p.m. The Applicant shall not leave India without prior permission of the Special Court taking N.D.P.S. matters.

iii) The order of bail will be given effect only after the applicant furnishes to the investigating officer the details about her place of residence and address where she proposes to stay after he is enlarged on bail. The applicant will not change her residential address thereafter till the conclusion of trial without prior intimation to the Investigating

officer.

iv) The bail is granted subject to condition that the applicant shall not directly or indirectly, make any inducement or threat to any prosecution witnesses and shall not in any manner tamper with the prosecution evidence.

v) The applicant shall cooperate with the learned Trial Judge for expeditious disposal of the case. Any attempt by the applicant to delay the trial may be a ground for cancellation of bail.

vi) Any observation made in this order shall not be construed as any finding or any expression of opinion on the merits of the case at the time of trial.

vii) Application is disposed of in above terms.

viii) Parties to act on an authenticated copy of this order.

(S.C.DHARMADHIKARI, J)